

## Message

**From:** Svingen, Eric [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6CC799E3A0E04EA6B190F99E036B7CE7-ESVINGEN]  
**Sent:** 10/31/2017 9:53:54 PM  
**To:** Aburano, Douglas [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5058d128e7854b4895441ff23c8f6c01-DAburano]  
**Subject:** FW: Ozone in the News - New York's Lawsuit Threat Asks EPA...

Here's one news clipping in my email relevant to your question.

**From:** Ozone Implementation Team [mailto:no-reply@sharepointonline.com]  
**Sent:** Monday, October 30, 2017 10:43 AM  
**To:** Svingen, Eric <Svingen.Eric@epa.gov>  
**Subject:** Ozone in the News - New York's Lawsuit Threat Asks EPA...

 New York's Lawsuit Threat Asks EPA... has been added



Mackintosh, David

10/30/2017 11:41 AM

**Title:** New York's Lawsuit Threat Asks EPA To Issue Ozone FIPs For Five States

**Body:**

## New York's Lawsuit Threat Asks EPA To Issue Ozone FIPs For Five States

October 26, 2017

New York is threatening to sue EPA unless the agency swiftly develops federal implementation plans (FIPs) imposing ozone-reduction mandates on five upwind states to curb interstate emissions transport, but the Trump EPA's focus on boosting states' role in environmental protection suggests it is unlikely to grant such a request.

In an Oct. 26 notice of intent (NOI) to sue, New York Gov. Andrew Cuomo (D) and Attorney General Eric Schneiderman (D) say they will sue the agency if it does not issue the FIPs within 60 days. The plans are necessary to implement EPA's 2008 ozone national ambient air quality standard (NAAQS) of 75 parts per billion (ppb), after EPA in 2015 found the states had failed to submit interstate ozone plans of their own, as required by the Clean Air Act.

"With this action, New York makes it clear that we will not stand idly by as other states shun their responsibility to keep our nation's air quality safe," said Cuomo in a statement on the NOI, which seeks FIPs for Illinois, Michigan, Pennsylvania, Virginia, and West Virginia.

The move marks an escalation of action East Coast states are already taking to try to force reductions in interstate ozone pollution, such as petitioning EPA to directly regulate individual power plants in upwind states.

For example, Maryland is suing the agency over its failure to respond to a petition asking for direct federal regulation of 36 electric generating units in five upwind states: Indiana, Kentucky, Ohio, Pennsylvania and West Virginia.

It is unclear whether EPA has any interest in issuing the FIPs within the next 60 days, particularly given EPA Administrator Scott Pruitt's focus on "cooperative federalism" and increasing states' role in environmental regulation. Environmentalists have recently suggested that the agency is approving more state implementation plans (SIPs) -- air law compliance plans -- that fall short of legal requirements due to the administration's deregulatory agenda.

EPA can impose a FIP through which it directly writes the emissions controls for states in which it finds SIPs inadequate, but observers say the agency has signaled a shift away from this approach.

Association of Air Pollution Control Agencies Executive Director Clint Woods said in a recent interview that EPA in recent years has "shifted toward a FIP presumption" for some programs, but he expressed hope that states will be able to "get the right information and EPA guidance to develop an approvable SIP" for its various air programs, including planning for compliance with the NAAQS.

The NOI appears to also be subject to Pruitt's Oct. 16 directive aimed at prohibiting "sue-and-settle" agreements through which groups sue the agency to secure settlement agreements committing the agency to take regulatory actions by legally binding deadlines. The directive includes a commitment to post NOIs to sue the agency within 15 days of EPA receiving them; contact any states or regulated entities affected by potential settlements and consent decrees; and publish consent decrees and settlement agreements within 30 days, among other measures.

### **Legal Challenges**

The interstate air pollution legal challenges from New York and Maryland also underscore that Eastern states believe the 2011 Obama-era Cross-State Air Pollution Rule (CSAPR) interstate emissions reduction trading program -- and a 2016 update to the program -- is inadequate to help states attain EPA's ozone standards, including the 2008 limit. CSAPR aimed to satisfy the air law's "good neighbor" requirement that states mitigate their air emissions that significantly contribute to problems attaining or maintaining the ozone NAAQS in other states downwind.

Originally conceived to help states attain the 1997 ozone standard, expressed as 84 ppb, the Obama EPA updated CSAPR in 2016 to help states meet the tougher 2008 NAAQS of 75 ppb. The program imposed FIPs on states giving them emissions caps, or "budgets," for nitrogen oxides (NOx), the primary ozone precursor emitted by power plants. EPA in 2015 adopted a tougher-still NAAQS of 70 ppb, but the Trump administration has not indicated it will issue any further trading rule to enable states to meet the good neighbor clause.

However, East Coast states with persistently high ozone levels have long noted that CSAPR was only a partial solution to the ozone transport problem, by EPA's own admission. Those same states defended the rule in court against attacks by upwind states opposed to its emissions caps, but always with a view to preserving the rule's legal framework for the future as much as for actual NOx cuts it achieves.

Litigation over the 2016 CSAPR update rule is currently proceeding in the U.S. Court of Appeals for the District of Columbia Circuit case *State of Wisconsin, et al. v. EPA, et al.*, where New York is one of several states intervening on EPA's behalf to defend the CSAPR update from other states that oppose the rule.

The state in its NOI is now seeking to compel EPA to go further than the updated CSAPR. In his notice letter to the agency, Schneiderman says that CSAPR update "did not completely fulfill

EPA's outstanding obligation under the Act to prohibit interstate transport of air pollution," a duty that had an August deadline under the air law.

Schneiderman says that EPA's own air quality modeling shows that even after implementation of emissions reduction measures required by the CSAPR update, several New York counties "will continue to have problems attaining the 2008 ozone NAAQS in 2017." He identifies Illinois, Michigan, Pennsylvania, Virginia and West Virginia, among other, unnamed states, as "significant" contributors to New York's attainment problem.

New York is also one of several states threatening the Trump EPA with a lawsuit over the agency's failure to issue final designations of which areas of the country are attaining or in nonattainment with the 2015 ozone NAAQS of 70 ppb, after EPA missed an Oct. 1 air law deadline to issue designations. The designations are necessary to enable states to craft SIPs to meet the new standard, including "good neighbor" SIPs to meet that standard. -- *Stuart Parker* ([sparker@iwpnews.com](mailto:sparker@iwpnews.com))

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